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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE GUARANTEE COMPANY OF
NORTH AMERICA USA,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

CITY OF RIVERSIDE,

Real Party in Interest.

E051942

(Super.Ct.No. CIVSS814933)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Donald R. Alvarez,
Judge. Petition granted.

Andrade & Associates, Rick Andrade and Kimberly J. Wind for Petitioner.

No appearance for Respondent.

Gibbs, Giden, Locher, Turner & Senet, Theodore L. Senet and Andrew O. Smith
for Real Party in Interest.

In this matter we have reviewed the petition and the opposition thereto, which we conclude adequately address the issues raised by the petition. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.) Because the trial court erred in granting real party in interest's motion for change of venue, we grant the petition for writ of mandate to vacate that order.

BACKGROUND

This petition arises out of a dispute involving a construction agreement between City of Riverside (Riverside) and Garcia Juarez. Garcia Juarez agreed to perform underground utility construction for a sum exceeding \$2 million. Petitioner, The Guarantee Company of North America USA (Guarantee), issued a performance bond for satisfactory completion of the project by Garcia Juarez.

A dispute arose between Riverside and Garcia Juarez, which generated a suit for wrongful termination and payments due by the latter against the former. Riverside cross-complained against Garcia Juarez and Guarantee for breach of contract, breach of warranty, construction defects, etc. Guarantee was also sued on the performance bond.

Garcia Juarez filed a motion to change venue to a neutral county pursuant to Code of Civil Procedure section 394¹ because it claimed its principal place of business was in Long Beach. Riverside opposed, asserting that Garcia Juarez did a substantial amount of

¹ Statutory references are to the Code of Civil Procedure unless otherwise indicated.

business in Riverside County and maintained an office in Perris. Garcia Juarez denied that it did a substantial amount of business in Riverside, claiming that the Perris office was only an office of a separate subsidiary that it had been using temporarily.

Guarantee entered into a stipulation with Riverside to be bound by the decision of the Superior Court of Riverside County regarding venue. In return, Riverside agreed that the entry of default against Guarantee could be set aside.

In August 2008, the court granted the change of venue motion, transferring the case to the Superior Court of San Bernardino County.

Two years later, in August 2010, Riverside moved to return venue to Riverside County under section 397 for the convenience of witnesses and the ends of justice. It claimed that Garcia Juarez had submitted fraudulent declarations to support the original change of venue motion. It asserted that, in fact, Garcia Juarez had been operating out of the Perris office since September 2007, and that its employees testified in recent depositions that the Perris office was the company's main office and had been since 2007. Furthermore, the purportedly separate subsidiary was actually a "dba" of Garcia Juarez.

Both Garcia Juarez and Guarantee opposed this motion, asserting that Riverside was just re-arguing the same facts concerning Garcia Juarez's operation in Perris. They also contended that Riverside had failed to make a sufficient showing under section 397 for re-transfer. It was noted that Riverside had failed to provide a list of witnesses for all sides and explain the materiality of their testimony, and that Riverside failed to show extraordinary circumstances to justify the change. Guarantee argued as well that it is

entitled to a neutral venue because it is an out-of-state defendant, which is registered in Los Angeles County.

The trial court granted Riverside's motion to transfer the case back to Riverside County. It noted that Garcia Juarez contracted to work in Riverside where the majority of the witnesses live or work, where the contract was executed, and where the breach occurred. Although it initially indicated that both defendants reside there, it later admitted it misspoke, but noted that section 394 was permissive in any case. The trial court granted Riverside's motion to change venue to Riverside County.

DISCUSSION

When a motion for change of venue is made under section 397 on the grounds that the convenience of witnesses and the ends of justice would be promoted by the changes, the supporting declarations must show: (1) the name of each witness; (2) the expected testimony of each witness; and (3) facts showing why the attendance of said witnesses at trial will be inconvenient and why the ends of justice would be served by a transfer. (*Peiser v. Mettler* (1958) 50 Cal.2d 594, 607.) Convenience to witnesses only is important and not the convenience of parties or employees of parties. (*Wrin v. Ohlandt* (1931) 213 Cal. 158, 159-160; *Dillman v. Superior Court* (1962) 205 Cal.App.2d 769, 773-774.) Using these criteria, Riverside's showing to return venue to Riverside County was totally inadequate using these criteria.

Secondly, assuming *arguendo* that the original change of venue was improper, that irregularity does not justify the transfer back to Riverside County in light of the fact that petitioner Guarantee is also a nonresident defendant. Venue in a neutral county under

section 394 is warranted if any defendant is not doing business in the county even though all others are. (See *Westinghouse Electric Corp. v. Superior Court* (1976) 17 Cal.3d 259, 275.) Moreover, the provisions of section 394 are considered mandatory. (*Golden Gate Bridge, Highway & Transportation Dist. v. Superior Court* (2004) 125 Cal.App.4th 177, 183.)

Finally, the stipulation that petitioner entered into when the original venue motion was made cannot be interpreted to preclude its opposition to the present motion. It merely agreed that venue could be in any neutral county the Superior Court of Riverside County chose at that time. It agreed not to file any motions to change venue; it did not agree never to oppose future motions to change venue.

DISPOSITION

Let a peremptory writ of mandate issue directing the Superior Court of San Bernardino County to vacate its order transferring venue to Riverside County and to issue a new and different order denying the motion to change venue.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Petitioner to recover its costs.

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MILLER
Acting P. J.

We concur:

HOLLENHORST
J.

KING
J.